No. 83-629

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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HASBRO INDUSTRIES, INC., *et al.*,

Petitioners,

vs.

A/S GARONNE-GLITTRE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION OF HASBRO INDUSTRIES, INC., *et al.* FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Questions Presented

Whether the mandate in 46 U.S.C.A. §1303(1) that the carrier shall exercise due diligence to make the vessel seaworthy calls for a less rigorous standard of performance where the carrier is a charterer than where it is the owner of the vessel.

List of Parties to the Proceeding

A A Importing Inc.

A & A Trading Corporation

Ace Sportswear Inc.

E. A. Adams & Son, Inc.

Kurt Adler Inc.

M. Adler's Son, Inc.

Advance Shipping Co., Inc.

Airco, Inc.

Allied International American Eagle Trading Corp.

American Forests Products Corporation

American Home Toy Parties, Inc.

American Imports Incorpoated

Amico Inc.

Aqua Leisure Industries, Inc.

Ara Services, Inc.

Associated Dry Goods Corporation

Astra Trading Corporation

Ataka America, Inc.

Frederick Atkins Inc.

Baby World Co., Inc.

Eugene B. Baehr & Sons

Bandwagon, Inc.

Barnes-Hind Phamaceuticals, Inc.

L. Batlin & Sons, Inc.

Benamy & Company, Inc.

Benay-Albee Novelty Co., Inc.

The Bendix Corp., Industrial Controls Div.

J. E. Bernard & Co., Inc.

Bevis Industries, Inc.

Brehar Importing Company

Brite Industries Inc.

Joseph P. Brooks

Brothers Import & Development Ltd.

Bruce Distributors Inc.

Brumberger Co., Inc.

Bernard Bryan

A. L. Buschman Inc.

Jack Buvitt, Inc.

Lee Byron Corporation

Cape Hart Corporation

Cardinal Industries, Inc.

CBS Imports Corp.

Centronics Data Computer Corp.

Chugai Boyeki (America) Corp.

Clearview Products Inc.

Isaac B. Cohen & Sons Corp.

Cole National Corporation

Colonial Candle Company of Cape Cod, Inc.

Colony Import & Export Corp.

Colorama Designs, Inc.

Colibri Corporation of America

Communications Products Inc.

Container Transport International

Continental Crafts Company

Coro, Inc.

Cosmo Electronics Ltd.

Country Store Products, Inc.

D. A. C. Toymakers, Inc.

Dart Industries, Inc.

Dartmouth Skis, Inc.

Decor Novelties, Inc.

Delaware Curative & Workshop Inc.

L. W. Dewey

H. Dreyfuss & Co., Inc.

Dual-Lite Co., Div. of The Sundscriber Corp.

E-Lite Co., Inc.

Eastern Import Co., Inc.

Electro Plastics, Inc.

Elgin National Industries, Inc.

Enco National Corp.

N. Erlanger, Blumgart & Co., Inc.

Etna Worldwide Import Corp.
Etone Doll & Toy Co., Inc.
Famous Maid Brassiere Corp.
Fashion Rite Girl Coat Inc.
Fedtro, Inc.
Fehr Bros. Manufacturers Inc.
The Feit Company Inc.
Ferncrot Import Co.
The Ferum Co., Inc.
Fife-Freeman Corporation
Five "S" Enterprises, Inc.
Fleet Street Ltd.
Fort Inc.
Fortunoff Silver Sales, Inc.
Franklin Stores Corp.
Friendly Home Parties, Inc.
Richard Gauley
General Crafts Corporation
General Foods Corp.
J. Gerber & Co., Inc.
Gerli & Co., Inc.
Giant Stores Corp.
Gilchrist Company
Giltex, Inc.

Gladdings-Clarion Inc.
Gliddendurkee, Div. of SCM Corp.
Globe Manufacturing Company
Louis Goldey Co. Inc.
Morris J. Golombeck Inc.
Gorham, Division of Textron Inc.
Grace Knitting Co.
The Grand Union Company
Grandoe Glove Corp.
W. T. Grant Co.
Griffon Cutlery Corp.
Grosset & Dunlap Inc.
Victor B. Handal & Brothers, Inc.
Harrison Pierce & Co., Inc.
Hasbro Industries, Inc.
Julius Heyman Co., Inc.
M. Hidary & Co., Inc.
Hitachi Metals America Ltd.
Holiday Fair Inc.
Holly Stores Inc.
John A. Homsy
Housewares American Corp.
Hub Floral Corporation
Hudson Shoe Machinery Co.
Hunt International Co.

IBM Corporation
IBM World Trade Corp.
Inter-Mares Trading Co., Inc.
International Glass & Containers, Ltd.
Inter-Pacific Corporation
Yoshihide Ishiyama
J & K Sales Company, Inc.
J. V. C. America Inc.
Jamesway Corporation
Jay Dee Imports, Inc.
Kamco Industries Inc.
David Kamenstien, Inc.
Kanematsu-Gosho (U.S.A.) Inc.
Katone Corporation
Ira G. Katz, Inc.
W. Kay Company, Inc.
Kitchen Ready Foods Corp.
S. Klein Department Stores, Inc.
Kowa American Corp.
S. S. Kresge Company
Lafayette Electronics International Inc.
Lanbry Import Co., Inc.
La Rue Jewelry Co., Inc.
Laura Accessories, Inc.

La Verdiere's Super Drug Stores
Gregory S. Lawrence
Harold Leonard & Co., Inc.
M. Lidell, Inc.
Lollytogs Inc.
M. Lucas Distributing Co., Inc.
M. I. M. Lador, Inc.
Magic Novelty Co., Inc.
Marcus Display Industries, Inc.
Marshall Trading Corporation
Maurice Sporting Goods Inc.
Meadows Wye & Co., Inc.
Meer Corporation
Mercury Products Corporation
Mericana Products Inc.
Miller Harness Co., Inc.
Miller Supply Corp.
E. Miltenberg, Inc.
Mitsubishi International Corporation
Model Rectifier Corp.
Murata Manufacturing Co., Inc.
Murwal Inc.
Nancy Sales Co., Inc.
National Silver Co.

Nichimen Co., Inc.
Non-Ferrous International Corporation
Nosawa New York, Inc.
Numark Electronics Corporation
K. Ogawa & Co., Inc.
Kurt Orban Company, Inc.
Oriental Exporters, Inc.
Orientex Ltd.
Osaka Commercial Co., Ltd.
The Otto Gerdau Company
Owens-Illinois Inc.
Mario Papa & Sons, Inc.
Pellon Corporation
Norman Perry, Inc.
Personident, Inc.
Philmore Mfg. Company, Inc.
Pilgram Infants Wear Co. Inc.
Polaroid Corporation
Henry Pollak Inc.
Polly Gaz International Corp.
C. H. Powell Company
Present Trading Corporation
Profile Sports Corp.
Providence Import Co., Inc.

Prudential Metal Supply Corp.
William Rand Incorporated
Regal Accessories Inc.
Regent International Corp.
Reliance Products Corporation
Reynolds Fasteners, Inc.
Riviera Manufacturing Corporation
Rodele Industries, Inc.
Rolo Manufacturing Co., Inc.
Rome Fastener Corporation
C. Rosenbach Company, Inc.
Sac Imports Ltd.
Salix Import, Inc.
Sally Gee Inc.
Samara Brothers, Inc.
Sanitoy, Inc.
Leonard Satz
Savage Arms Div. of Emhart Corporation
Savin Business Machines Corp.
Scandia Trading Co., Inc.
Scarves by Vera, Inc.
Schmid Brothers Inc.
Schneider International Ltd.
Sekai Manufacturing Co., Inc.

Paul E. Sernau, Inc.

B. Shackman & Co.

Sheridan Creations Inc.

Sherman Specialty Toys Inc.

Shigoto Industries, Ltd.

Sigallo, Ltd.

Leonard Silver Manufacturing Co. Inc.

Simon Overseas Corp.

Sino-American Export & Import Co., Inc.

Sirco Import Corporation

Solar Sound Systems Inc.

Southwire Company

Spanish American Skin Co.

Specialty Ink Co., Inc.

Sol Spitz Co., Inc.

Sportswear Industries Inc.

Standard Neo-Lite Co., Inc.

Stein Hall Ltd.

Stern & Stern Textile, Inc.

Stop and Shop Companies, Inc.

F. J. Strauss Co., Inc.

Styson, Inc.

Super Value Distributors, Inc.

I. S. Sutton & Sons, Inc.

Sydell Imports, Ltd.

Teknatex, Inc.

The Thomas Co., Inc.

Toyomenka America Inc.

Trau & Loevner, Inc.

Traveler Trading Company

Treasure Masters Corporation

Trina, Inc.

Twin Fashions, Inc.

Bernhard Ulmann Co.

Union Novelty Company, Inc.

United Decorative Flower Co. Inc.

United Nations

United Scientific Co., Inc.

Universal Fixture Manufacturing Co., Inc.

Universe Shoe Corporation

Uto American, Inc.

Walbead, Inc.

Edward A. Walderman Co., Inc.

Washington Forge, Inc.

Weingeroff, Larami, President Corp.

Westerman Manufacturing Co., Inc.

Westville Chemical Corporation

Wheaton Industries

Wilmod Company, Inc.

Wind Corporation

Yuasa Trading Co. (America) Inc.

Chori America, Inc.

Evinger Corp.

Lane Bryant, Inc.

Briggs & Stratton

Life Corporation

USM Corporation

Bates Manufacturing Co.

National Assoc. Supermarket Apparel Distributors, Inc.

SCM Corp.

Eagle Trading Corp.

Nissho-Iwai American Corp.

Mammoth Mart

Bradford Novelty Co. Inc.

Sobel Shipping Co.

Commercial Steel Co.

Gimbel Bros. Inc.

The Nissan Fire & Marine Ins. Co. Ltd.

Tokio Marine Management Inc.

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PETITION OF HASBRO INDUSTRIES, INC., *et al.* FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on May 4, 1983.

Opinion Below

The opinion of the District Court, printed in the Appendix D, 14a, is reported in 1980 A.M.C. 1425. The orinal opinion of the Court of Appeals was reported in 698 F. 2d 1008, but was expunged when modified by the Court. The modified opinion, printed in the Appendix A, 1a, is reported in 705 F. 2d 339.

Jurisdiction

The judgment of the Court of Appeals for the Ninth Circuit was entered on February 8, 1983. A timely petition for rehearing and rehearing en banc was filed and an amended opinion and judgment was filed on May 4, 1983. A second timely petition for rehearing and rehearing en banc was filed and was denied on July 11, 1983. This petition was filed within 90 days of that date, October 9 and 10, 1983, being a Sunday and Federal Holiday, respectively. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

Statutory Provision Involved

46 U.S.C.A. §1303(1) provides:

> The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to (a) Make the ship seaworthy; (b) Properly man, equip, and supply the ship; . . .

Statement of the Case

Petitioners are cargo interests which sustained loss as a result of a fire aboard the M.V. "ST. CONSTANTINE" while en route from Japanese to East Coast United States ports.

After trial in the United States District Court for the District of Hawaii, the fire and resulting cargo damage were found to have been caused by the vessel's unseaworthiness by reason of excessive vibration of the main engine and by reason of a woeful lack of proper training of the crew in fire fighting. The cause of excessive vibration was found to be a deficiency of the engine bedplate which brought about the periodic breaking of bolts holding the engine to the vessel's hull. This unusual and worsening condition was made manifest to the owner's management by the need to buy replacement bolts in ever increasing numbers. The condition would be obvious to anyone who rode the ship. The end result of excessive vibration was fracture of a cast iron valve in the lube oil system of the turbo chargers causing oil to escape and to strike the hot manifold of the main engine and to ignite, setting the engine-room ablaze and ultimately the cargo compartments. Petitioners were awarded judgment for approximately $9,000,000 against the vessel owner on the ground that it had failed to exercise due diligence to make the vessel seaworthy. The vessel owner did not appeal, but due to its financial straits, the judgment remains largely unsatisfied.

The vessel had a charterer and subcharterer, but, apparently because they were interrelated companies, the trial court treated them as though they had coextensive responsibilities. The charterers were found to be carriers and subject to the obligations of COGSA as they had issued bills of lading which constituted contracts of carriage between themselves and the shippers.

The subcharterer, Barber Lines A/S, had solicited the cargo for transportation in its regularly scheduled worldwide service. It issued the bills of lading and signed them "Barber Lines A/S, carrier". Its name was emblazoned across the tops of the bills of lading and the names and addresses of its offices throughout the world were set out therein. The charterer had had its house colors painted on the vessel's stack and while in port the vessel flew the charterer's flag. The fact that it did not own or operate or maintain the ship was given no publicity whatsoever.

The vessel's charterers were held not liable for cargo loss and damage on the ground that they had fulfilled their COGSA obligation to shippers to exercise due diligence, "before and at the beginning of the voyage", to make the vessel seaworthy by having provided in their charter with the vessel owner that the vessel owner must maintain the vessel in class and up to Solas standards, and must conduct numerous surveys. The Court of Appeals for the Ninth Circuit affirmed, then withdrew its opinion on the filing of a petition for rehearing and rehearing en banc and modified the opinion, but again affirmed the District Court. A second petition for rehearing and rehearing en banc was denied.

REASONS FOR GRANTING THE WRIT

A. The case involves an important question of Federal law which should be, but has not been, settled by this Court.

The United States Carriage of Goods by Sea Act (hereinafter referred to as COGSA), provides that "The term 'carrier' includes the owner or the charterer who enters into a contract of carriage with a shipper", 46 U.S.C.A. §1301(a). It provides that "The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence (a) to make the ship seaworthy; (b) properly man, equip, and supply the ship; • • •" 46 U.S.C.A. §1303(1).

It has long been settled that the carrier, who is the owner of the vessel, cannot satisfy the obligation to exercise due diligence unless it takes the care which a prudent owner would take to make the vessel fit for the contemplated carriage of cargo. *The Southwark,* 191 U.S. 1, 15, 24 S.Ct. 1, 48 L.Ed. 65 1903; *The Edwin I. Morrison,* 153 U.S. 199, 215, 14 S.Ct. 823, 38 L.Ed. 688 (1894); *The Esso Providence,* 112 F.Supp. 631, 1953 A.M.C. 1317 (S.D.N.Y.). There appears to be no decision by this Court as to whether COGSA §1303(1) calls for the same or a different standard of care where the carrier is a charterer of the vessel.

The decision by the Ninth Circuit herein appears to be the first on the issue by a U.S. Court of Appeals. Its ruling that the carrier who is a charterer need not exercise the care of a prudent owner, but can satisfy the obligation to exercise due diligence by delegating the responsibility to a classification society and the vessel owner, and, having done so, will escape liability for their defaults, is of major importance to shippers for two reasons:

1. The decision creates a loophole whereby the obligation COGSA imposes on the carrier to exercise due diligence to make the vessel seaworthy may be evaded. This can be accomplished by the shipowner chartering the vessel and stipulating in the charter that the shipowner is not to be made a party to the bill of lading contracts of carriage. Such a provision would not violate COGSA as it does not compel the owner to issue the bills of lading. The Act contemplates that the carrier may be the owner or the charterer who issues the bills of lading. 46 U.S.C.A. §1301(a). It is not unusual for the charterer to issue bills of lading binding only itself. *Dempsey & Associates* v. *S.S. SEA STAR*, 461 F.2d 1009, 1015 (2 Cir., 1972); *Yeramex International* v. *S.S. TENDO, S.S. LINDO* 595 F.2d 943, 944 (4 Cir., 1979). Shippers are generally powerless to require otherwise by reason of the carrier's superior bargaining power which has been duly noted by our Courts. By not becoming a party to the contracts of carriage, the owner will be under no obligation to the shippers to exercise due diligence to make the vessel seaworthy. The shippers in that event would have only the obligation of the charterer to exercise due diligence, an empty right if the charterer may divest itself of responsibility for unseaworthiness by delegating the duty to exercise due diligence to the shipowner and classification society as the Courts below held herein.

2. Unless all carriers have equal obligations under COGSA, shippers are disadvantaged in contravention of the purposes of the Act.

The holding that the quality of the obligation to exercise due diligence to which cargo is entitled is to depend on whether the carrier is an owner or charterer poses for cargo interests problems COGSA was intended to eliminate.

Finding a reliable carrier would become more difficult. Past performance could no longer be relied on as prior

vessels may have been owned by the carrier whereas this one may be chartered. Complex legal matters must be investigated, i.e., does the issuer of the bill of lading own or charter the ship, and, if the latter, will the owner be bound by the bill of lading, and what is its reputation and financial status. If, as is probable, shippers lack the sophistication to learn and comprehend these distinctions, they may be misled by appearances and erroneously believe that the party whose agreement they secure to carry the goods is responsible for their safe transportation and for proper maintenance of the ship. It is easy for carriers to mislead. Shippers here could hardly be faulted for believing that Barber Lines would transport the goods. It solicited the goods for carriage. The bills of lading had its name at the top, listed its agents throughout the world and were executed by it as "carrier". The fact that the ship was owned and operated by a one-ship corporation having a nominal office in Liberia and its real manager in Greece was never divulged.

It seems reasonable to assume that a recognized, experienced, visible steamship company having a local office and a worldwide network of agents and running a regularly scheduled service, would be preferred by shippers as the responsible carrier rather than an unknown invisible one ship owner having no roots at the ports of shipment or discharge. However, under the holding below, a shipper's probable preference for a quality carrier will be largely denied if that carrier happens to be a charterer.

Failure to apply a uniform standard of care to all carriers would have an adverse effect on the negotiability of bills of lading. Uncertainty and a significant element of unreliability would be imposed upon bills of lading if the carrier it binds may have either of two different standards of responsibility for seaworthiness. Should consignees

stipulate in letters of credit, as it seems probable they would do if there are to be carriers of different rank, that the goods must be shipped under a bill of lading issued by a fully responsible carrier, an added burden will be placed on the bank which must at its peril determine whether the bill of lading presented by the shipper with a request for payment under the letter of credit is binding on the owner. Moreover, it may not be possible to ascertain from examination of the bill of lading whether the carrier owned or chartered the ship as there is no requirement in COGSA that the bill of lading designate that the issuer is the owner or a charterer.

It seems clear that it was not intended that there be two categories of carriers having different levels of responsibility. Discussing COGSA in *Herd & Co.* v. *Krawill Machinery Corp.*, 359 U. S. 297, 301, 79 S. Ct. 766, 769, 3 L.Ed. 2d 820 (1959) this Court held:

> "The Act is clearly phrased. It defines the term 'carrier' to include 'the owner or the charterer who enters into a contract of carriage with the shipper' §1301(a). It imposes particularized duties and obligations upon, and grants stated immunities to the 'carrier'. §§ 1302, 1303, 1304."

COGSA's imposition of duties on the "carrier" without specifying any variation in extent based on whether the carrier owns or charters the ship implies a single standard of care for all carriers.

The view that there should be one standard is supported by COGSA's purposes which, in accordance with proper statutory interpretation, must be considered in applying its provisions. *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270, 285, 76 S.Ct. 349, 359, 100 L.Ed. 309 (1956). This Court, referring to COGSA, noted in *Herd & C.* v. *Krawill Machinery Corp., supra,* at p. 301:

> "The legislative history of the Act shows that it was lifted almost bodily from the Hague Rules of 1921, as amended by the Brussels Convention of 1924."

"That history", Judge Friendly wrote in *Mitsui & Co., Ltd.* v. *American Export Lines*, 636 F. 2d 807, 815, (2 Cir. 1981), "leaves no room for doubt that the two dominant objectives of Congress were to insure uniformity in the basic rights and responsibilities arising out of bills of lading and—most important for our present inquiry—to fix 'an irreducible minimum of immunity of the carrier from liability.' H.R. Rep. No. 2218, 74th Cong., 2d Sess., 1 (1936). This latter objective underlies both the carrier's duties to furnish a seaworthy ship and to care properly for the cargo, 46 U.S.C. §§ 1301 (1) and 1303 (2), and the minimum level of liability established by §4(5). To fulfill Congress' ultimate objective, both aspects of the statute must be given effect; the carrier's duties would be meaningless if their violation entailed no significant liability."

To hold that the carrier which is a charterer may satisfy its duty to exercise due diligence by delegating the responsibility to the vessel owner and classification society not only finds no support in any express provision of COGSA, but violates its purposes of securing for shippers uniformity of responsibility and a meaningful level of liability on the part of the carrier.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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October 11, 1983

APPENDIX A

Opinion of the United States Court of Appeals For the Ninth Circuit

(Filed—February 8, 1983)

UNITED STATES COURT OF APPEALS
For the Ninth Circuit

Nos. 81-4660, 81-4644 and 82-4006

D.C. Nos. 73-3848 and 73-3955-MP

HASBRO INDUSTRIES, INC.,

Plaintiffs-Appellants,

vs.

M/S "ST. CONSTANTINE," et al.,

Defendants,

vs.

A/S GARONNE-GLITTRE, et al.,

Plaintiffs in Intervention-Appellees-Cross-Appellants.

Appendix A

Appeal from the United States District Court
for the District of Hawaii

Honorable Martin Pence, District Judge, Presiding

Argued and Submitted October 20, 1982

Before: Canby, Norris and Reinhardt, Circuit Judges.

Per Curiam:

Appellants Hasbro Industries, Inc., and A. A. Importing, Inc., were owners or underwriters of cargo destroyed when a fire broke out aboard the M/S St. Constantine, a cargo ship owned by the St. Constantine Maritime Co., Ltd. Appellants filed claims in a limitation proceeding brought by the vessel under the Limitation of Liability Act, 46 U.S.C. §§ 190-195 (1976). The claims were based upon the carriage of Goods by Sea Act (COGSA), 46 U.S.C. §§ 1300-1315 (1976). The district court found that the fire started when a lube oil line valve fractured due to excessive engine vibration and the absence of a necessary pipe support bracket, causing oil to spill onto the hot exhaust manifold and ignite. The crew was unable to extinguish the blaze because of inadequate training in firefighting techniques. The court concluded that the shipowner had notice of the defects and lack of training and was therefore liable because it failed to exercise due diligence to ensure that the vessel was seaworthy and that the crew was properly trained. The shipowner has not appealed.

Appellees A/S Garonne-Glitter and Barber Lines A/S intervened as plaintiffs in the proceedings below. Appellees were time charterers and subcharterers, respectively, of the vessel, with whom appellants had contracted for the transport of their goods. Appellants cross-claimed against

appellee-charters, alleging that the charterers were also liable because their duty to exercise due diligence was identical to the duty owed by a shipowner under COGSA, so that a breach of that duty by the shipowner was necessarily a breach by the charterers. The district court disagreed, finding that the charterers were absolved from liability because they had acted with the due diligence expected of reasonably prudent time charterers. We affirm.

Under COGSA, both shipowners and charterers who enter into a contract for carriage of goods are considered "carriers." 46 U.S.C. § 1301(a). As such, shipowners and charterers must exercise due diligence to make the vessel seaworthy and to properly man, equip, and supply the ship. 46 U.S.C. § 1303(1), (2). If a carrier exercises due diligence, then the carrier will be exonerated from liability for loss due to fire unless caused by the carrier's "actual fault or privity." 46 U.S.C. § 1304(2)(b). Thus, the overriding obligation under COGSA is the duty to exercise due diligence. *Sunkist Growers Inc.* v. *Adelaide Shipping Lines*, 603 F.2d 1327, 1338 (9th Cir. 1979), *cert. denied*, 444 U.S. 1012, 100 S. Ct. 659, 62 L. Ed. 2d 640 (1980).

Appellants claim that the question whether due diligence has been exercised is a question of law reviewable *de novo* on appeal. On the contrary, this circuit has repeatedly held that due diligence is essentially a negligence concept and that determinations of negligence in admiralty cases are findings of fact which will be given application unless clearly erroneous. *Waterman Steamship Corp.* v. *Gay Cottons*, 414 F.2d 724, 735 N. 27 (9th Cir. 1969); *Rederi A/B Soya* v. *SS Grand Grace*, 369 F.2d 159, 163 (9th Cir. 1966). Of course, it is true that the question of what standard should be applied in determining due diligence is a question of law. *Id.* We find, however, that the district court

applied the correct standard here. To hold otherwise would impose liability on time charterers for unseaworthiness resulting from the shipowner's lack of due diligence, regardless of whether the charterer acted reasonably and prudently. As we stated in *Sunkist*, "[I]f the carrier used due diligence, the unseaworthiness would be excusable." 603 F.2d at 1335 (emphasis omitted). Thus, where the charterers exercised due diligence but the shipowner did not, only the shipowner will be held liable, and the unseaworthiness is excusable with respect to the charterers.

Appellants' basic assertion is that the shipowner's duty of due diligence is identical to the charterer's, with the result that whenever the one breaches its duty the other is liable vicariously. In support of this proposition, appellants cite section 1301(a) of the Act and *Sunkist*.

First, section 1301(a) serves only to include both shipowners and charterers within the definition of "carrier." While both owe a duty of due diligence as a matter of law, 46 U.S.C. § 1304(1), the question whether particular circumstances amount to a breach is one of fact, the determination of which will vary with the circumstances. *See Waterman Steamship Corp.*, 414 F.2d at 735 n.27. Since liability for loss by fire may be imposed only where there is "actual fault," 46 U.S.C. § 1304(2)(b), a breach is necessarily personal to the "carrier" that is responsible for the harm. Thus, it is perfectly comprehensible that in some cases a shipowner may be liable when a charterer is not. Nothing in the statute suggests otherwise.

Second, the *Sunkist* case deals primarily with allocation of the burden of proof in COGSA cases, and with the trial court's error in shifting the burden to the cargo claimants once the carrier had made an initial showing. *See* 603 F.2d

at 1331, 1341. Because the court used the plural in referring to the potential liability of "appellees," meaning both shipowner and charterer, appellants maintain that both must be liable in *every* case. This overlooks the *Sunkist* court's statement that the "obligation to exercise due diligence . . . [applies] to the owners *or* charterers *personally*." *Id.* at 1341 (emphasis supplied). *Sunkist* does not require that the liability of one "carrier" must be imputed to all others. On the contrary, a district court must consider evidence of the extent and nature of the acts, omissions, and knowledge of the shipowner and charterer separately—just as the trial court did here. While this may sometimes lead to joint liability, it need not in every case.

The district court found that the shipowner, through its managerial employees, knew of the excessive vibration from a 1970 inspection report and from the purchase and replacement of an unusually high number of "holding down" bolts within the two years prior to the fire, but it failed to investigate the cause or effects of the engine vibration. The vessel owner also failed to take reasonable steps to ensure adequate training through periodic drills or formal instruction to all crew members on firefighting techniques. In addition, the shipowner knew that a pipe support bracket should have been attached to the lube oil pipe, and a reasonable inspection would have disclosed that the bracket was missing. This negligent conduct by the shipowner's supervisory or managing employees constituted a failure by the shipowner to exercise due diligence. *See Sunkist*, 603 F.2d at 1136.

The same cannot be said of the charterers. They were not privy to the knowledge held by the vessel owner and its managing employees. Nor were they in control of maintenance and repairs; under the terms of the charter party

the shipowner was solely responsible for maintenance. There is no evidence that the charterers knew about the 1970 report, the increasing and unusual number of broken "holding down" bolts in the two years prior to the fire, or the failure to train the crew adequately in firefighting techniques. Even if the inspections mandated within the charter party revealed that there had once been a bracket on the pipe, there would have been insufficient reason for the charterers to conclude that the condition of the engine was unsafe.

Moreover, the charterers proffered affirmative evidence to show that they exercised due diligence, and the district court found that they thereby sustained their burden of proof. We cannot say that that finding is clearly erroneous. *Waterman Steamship Corp., supra.* The charterers mandated within the charter party (1) that the vessel and crew be classified in the highest classification society; (2) that the vessel comply with all applicable provisions of the Safety of Life at Sea Co .vention (SOLAS); and (3) that numerous on-line and class survey inspections be performed as a prerequisite to their continued use of the St. Constantine. Under these circumstances the charterers did all that could be expected of diligent time charterers.

As the district judge noted during trial:

> [T]he charterer [would be] responsible if the ship were unseaworthy and the fire was caused by that which should have been clearly apparent to the charterer.
>
> But we do not have that situation here. We have the charterer endeavoring through the surveys to keep the ship a seaworthy vessel. We also have the charterer before any charter was entered into hav-

> ing first acquainted itself of the quality of the ship; that the ship, insofar as construction was concerned and its . . . condition at the time of the charter, was a ship that the charterer felt was seaworthy in every respect and fully able of taking care of the cargo of the charterer's clients.

Since we affirm the district court's conclusion that the charterers are not liable for the damage caused by the fire, we need not consider the issue presented in the cross-appeal, i.e., whether the COGSA limitation of liability applies to charterers.

Finally, we must address the question whether appellants' separate appeal was timely. The district court entered final judgment in this case on October 31, 1981. In addition to awarding damages against the shipowner and absolving charterers from liability, the court allowed the appellants prejudgment interest—but only at the rate permitted under Hawaii law. Appellants filed their notice of appeal on November 30, 1981. They made no challenge at that time to the rate of interest fixed by the district court. It was not until December 24, 1981, in a separate appeal, that appellants raised that issue. Although this separate appeal was well beyond the 30-day period within which an appeal must be filed, Fed. R. App. P. 4(a)(1), appellants contend that the appeal period did not begin to run until appellees filed their cross-appeal on December 10, 1981. No authority is offered for the notion that a cross-appeal somehow enlarges the time for appeal in this way, and we have found none. Appellants were required to file their appeal on all issues of which they wished review within 30 days of entry of the district court's final judgment on October 31. With respect to the issue of prejudgment interest, they failed to do so and therefore the separate appeal is time barred by Rule 4(a)(1).

AFFIRMED.

APPENDIX B

Judgment of the United States Court of Appeals For the Ninth Circuit

(Filed—May 4, 1983)

UNITED STATES COURT OF APPEALS
For the Ninth Circuit

Nos. 81-4660, 81-4644 and 82-4006

D.C. Nos. 73-3848 and 73-3955-MP

(District of Hawaii)

HASBRO INDUSTRIES, INC.,

Plaintiffs-Appellants,

vs.

M/S "ST. CONSTANTINE," et al.,

Defendants,

vs.

A/S GARONNE-GLITTRE, et al.,

Plaintiffs in Intervention-Appellees-Cross-Appellants.

Before: Canby, Norris and Reinhardt, Circuit Judges.

Appendix B

The opinion is amended as follows: Following the first full paragraph on page 584 of the slip opinion, the following paragraphs are inserted:

> Appellants' basic assertion is that the shipowner's duty of due diligence is identical to the charterer's, with the result that whenever the one breaches its duty the other is liable vicariously. In support of this proposition, appellants cite section 1301(a) of the Act and *Sunkist*.
>
> First, section 1301(a) serves only to include both shipowners and charterers within the definition of "carrier." While both owe a duty of due diligence as a matter of law, 46 U.S.C. § 1304(1), the question whether particular circumstances amount to a breach is one of fact, the determination of which will vary with the circumstances. See *Waterman Steamship Corp.*, 414 F.2d at 735 n.27. Since liability for loss by fire may be imposed only where there is "actual fault," 46 U.S.C. § 1304(2)(b), a breach is necessarily personal to the "carrier" that is responsible for the harm. Thus, it is perfectly comprehensible that in some cases a shipowner may be liable when a charterer is not. Nothing in the statute suggests otherwise.
>
> Second, the *Sunkist* case deals primarily with allocation of the burden of proof in COGSA cases, and with the trial court's error in shifting the burden to the cargo claimants once the carrier had made an initial showing. *See* 603 F.2d at 1331, 1341. Because the court used the plural in referring to the potential liability of "appellees," meaning both shipowner and charterer, appellants maintain that both must

be liable in every case. This overlooks the *Sunkist* court's statement that the "obligation to exercise due diligence . . . [applies] to the owners *or* charterers *personally*." *Id.* at 1341 (emphasis supplied). *Sunkist* does not require that the liability of one "carrier" must be imputed to all others. On the contrary, a district court must consider evidence of the extent and nature of the acts, omissions, and knowledge of the shipowner and charterer separately—just as the trial court did here. While this may sometimes lead to joint liability, it need not in every case.

The final sentence of the first paragraph of headnote 5, on page 584 of the slip opinion is stricken, and the following sentence is inserted in its place:

> Even if the inspections mandated within the charter party revealed that there had once been a bracket on the pipe, there would have been insufficient reason for the charterers to conclude that the condition of the engine was unsafe.

The second paragraph of headnote 5, on page 584 of the slip opinion, is amended to read as follows:

> Moreover, the charterers proffered affirmative evidence to show that they exercised due diligence, and the district court found that they thereby sustained their burden of proof. We cannot say that that finding is clearly erroneous. *Waterman Steamship Corp., supra.* The charterers mandated within the charter party (1) that the vessel and crew be classified in the highest classification society; (2) that the vessel comply with all applicable provisions of the Safety of Life at Sea Convention (SOLAS); and (3) that

numerous on-line and class survey inspections be performed as a prerequisite to their continued use of the St. Constantine. Under these circumstances the charterers did all that could be expected of diligent time charterers.

The first sentence of the second paragraph in the left hand column on page 585 of the slip opinion is stricken.

APPENDIX C

Order Denying Petition for Rehearing of the United States Court of Appeals for the Ninth Circuit

(Filed—July 11, 1983)

UNITED STATES COURT OF APPEALS
For the Ninth Circuit

Nos. 81-4660, 81-4644 and 82-4006

D.C. Nos. 73-3848 and 73-3955-MP
(District of Hawaii)

HASBRO INDUSTRIES, INC.,

Plaintiffs-Appellants,

vs.

M/S "ST. CONSTANTINE," et al.,

Defendants,

vs.

A/S GARONNE-GLITTRE, et al.,

Plaintiffs in
Intervention-Appellees-
Cross-Appellants.

Before: Canby, Norris and Reinhardt, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

Appendix C

The full court has been advised of the suggestion for en banc hearing, and no judge of the court has requested a vote on the suggestion. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX D

Decision of the United States District Court for the District of Hawaii

(Filed—February 21, 1980)

IN THE

UNITED STATES DISTRICT COURT
For the District of Hawaii

HASBRO INDUSTRIES, INC.,
Plaintiff,

vs.

M/S "ST. CONSTANTINE," et al.,
Defendant,

vs.

A/S GARONNE-GLITTRE, et al.,
Plaintiffs in Intervention.

Civil No. 73-3848

In the Matter of the Complaint
of
SAINT CONSTANTINE MARITIME CO., LTD., as Owner of the M.S. "ST. CONSTANTINE", for Exoneration from or Limitation of Liability

Civil No. 73-3955

Appendix D

DECISION ON PHASES I & II

BACKGROUND

On May 31, 1973, about 11:35 p.m .while en route from Japan to the United States, the M.S. ST. CONSTANTINE caught fire and burned several hundred miles north of Honolulu, Hawaii. The fire broke out in the vessel's engine room when a lube oil valve connected to the main engine's forward turbocharger fractured, lube oil flowed onto the hot exhaust manifold below, and thereupon ignited.

The fire spread throughout the engine room and into other portions of the vessel. The crew abandoned the vessel. The M.S. ST. CONSTANTINE was subsequently towed into Honolulu, where all salvageable cargo was removed. The burned out vessel was later sold for scrap.

Various actions were brought in Hawaii by the cargo interests against the shipowner and charterer. Cargo interests—the shippers, cosignees, or indemnitors of shipments of cargo on board the M.S. ST. CONSTANTINE at the time of the casualty—seek damages against both the shipowner and its time charterer, Barber Lines, A/S. *Cf.* 46 U.S.C. § 1301 (a). Fire being stipulated as the cause of the casualty, the owner sought exoneration under the Fire Statute of the United States, 46 U.S.C. § 182, and for exoneration on limitation of liability under 46 U.S.C. § 183.[1]

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[1] At the bench trial, however, the shipowner withdrew its petition under 46 U.S.C. § 183, thereby limiting the issues to those arising under 46 U.S.C. §§ 182 and 1304(2)(b).

Appendix D

The issues of this case, involving damage claims by the cargo owners against the owners and charterers of the vessel that burned at sea, were divided by this Court into three phases for trial purposes. The first phase or issue to be tried involved the liability of the owners and charterers, if any, arising out of the method and equipment by which the fire was fought by the ship's crew. The second phase for trial was to determine the responsibility for the cause of the fire. In the event that the cargo owners' legal claims are found to be correct, then lastly the loss sustained by the cargo owners will be decided. The amount of damages, if any, suffered by the cargo interests shall be heard before a Master or before this Court, as shall hereafter be determined. This written decision follows trials on the first two phases of the case. It augments the oral decision of this Court rendered from the bench at the conclusion of the trial on Phase I and sets forth this Court's decision on Phase II.

PHASE I: HOW THE FIRE WAS FOUGHT

FINDINGS OF FACT

1. The M.V. ST. CONSTANTINE was owned and operated by Saint Constantine Maritime Co., Ltd. The corporation in turn was owned by Karavias Limited, which also owned several other ships under similar corporate facades. At the time of the fire involved here, the ST. CONSTANTINE was under time charter to A/S Garonne-Glittre which had subchartered her to Barber Lines, A/S. Before sailing out of Yokohama, Japan, about May 26, 1973 for East Coats ports of the Unitedd States, she had loaded general cargo in various Far East ports under bills of lad-

ing issued by agents for Barber Lines, A/S, as carrier. She was about 800 miles north of Hawaii when, on May 31, 1973 at about 11:35 p.m., fire broke out in her engine room.

2. The fire was first noticed by an oiler whose cry of "fire" alerted the third engineer (unlicensed), who was on watch, as well as the acting Chief Engineer Gikas, who was in the nearby engine room workshop. The fire was then located at the starboard forward side of the main engine. They saw that a cast iron valve of the lube oil line running to the forward end of the forward turbocharger of the vessel's main engine had broken and lube oil was flowing from the broken valve onto the hot exhaust manifold of the main engine, which was almost directly under the valve. They saw the lube oil igniting from contact with the manifold. The flames at that time were about 3 meters high.

3. The acting Chief engineer Gikas ordered the third engineer and the oiler to use hand flare extinguishers on the fire. Since the fire occurred about the time that the watch was to be changed, on hearing the yelling another third engineer, also unlicensed, and the electrician came to the engine room and also fought the fire with hand extinguishers. The electrician used an extinguisher from a point on the stairs by the electrical control panel located just forward of the forward end of the main engine, and directed the foam from the extinguisher he was using at the base of the fire, which was aft and above him. Gikas shut down the engine, shut off the pump to the lube oil tank, and turned off the ventilator fans. The lube oil tank was a gravity feed tank higher than the engine so that the flow of lube oil from the tank into the lube oil line continued.

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4. Although Gikas testified that subsequent to the events next hereinafter set forth he attempted to (and believed he did) turn off the valve of the gravity feed tank to the lube oil line, this Court finds that as a matter of fact his efforts, if any, were unsuccessful.[2] If he made the attempt, he made it far, far too late at a time when the fire was raging too high and too hot for him to have been successful. This Court would hold him negligent for not having taken the steps by himself or through other seamen to have done it almost immediately after the discovery of the source of the fire. Gikas' failure to take early action to close the valve indicates to this Court his lack of fundamental preparation and knowledge of the various means available to control this type of fire.[3]

5. Although there was a telephone at the control panel where Gikas shut down the engine, he did not telephone the bridge for the fire alarm. This was contrary to the fire fighting procedure of the crew. Because of Gikas' failure to notify the bridge of the fire, the master, who was on the bridge at the time, first became aware that something was wrong when the engine stopped. The master then telephoned the engine room to inquire why the engine was stopped, but no one answering, he went to the engine room

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[2] The evidence showed conclusively that Gikas is an intelligent man. He was able to carry on the normal activities of a Chief Engineer even though he did not have the certificates formally entitling him to that position. His actions, as well as that of the other members of the engine crew, showed great bravery. Intelligence and courage, however, did not overcome the paucity of training in fighting engine room fires.

[3] See Sunkist Growers, Inc. v. Adelaide Shipping Lines, Ltd. (unpublished opinion No. 76-3112, 9th Cir. 1979).

himself and saw that it was on fire. His sole contribution at that time was to instruct Gikas to use all available means to fight the fire. He then returned to the bridge and sounded the fire alarm—about 8 minutes after the fire was first discovered. This prolonged delay was a causation factor in the resulting uncoordinated, unplanned, and unsuccessful fire fighting efforts.

6. Although there was sufficient time after the fire was discovered to have started the main and emergency fire pumps, no one was ordered to and no one ever did start the pumps.

7. The ST. CONSTANTINE engine room had been fitted with the number of hydrants and hoses with separate nozzles able to create spray, as required by SOLAS, and these were located where they could have been reached by any of the officers and crew who were in the engine room in the early minutes of the fire. The hoses were long enough to have easily reached to the fire area. Gikas, however, never considered using water because he had been told by the shipowner's Chief Engineer Kaloxylos, among others, never to operate water near electrical outlets nor on oil fires. He was unaware that water in the form of spray is extremely effective in extinguishing oil fires. In the instant case, water in spray or fog form could safely have been used in the engine room in spite of the presence of electrical wiring. Even though it should have been evident to Gikas within the first 5 minutes that the fire was continuing to grow and was beyond the capabilities of the hand extinguishers, Gikas, then, neither ordered nor used any other equipment or technique.

8. With both the main and emergency pumps inoperative, there was no water available for the crew to use after

the alarm had been sounded. A few, sua sponte, formed a bucket brigade and attempted to throw water into the engine room by that means. Adequate fire fighting training procedures should have resulted, at least, in some attempt to start the emergency pumps after engine shut down. Gikas could have, and should have, ordered one of the crew or engineers who were present within moments after the fire started to start the pumps instead of confining their fire fighting activity to the use of hand extinguishers. Had this been done, the deck crew would not have been forced to such futile fire fighting technique.

9. If Gikas had been properly trained or instructed, when the use of hand extinguishers proved futile he should have ordered water sprayed on the fire. Actually, no danger of electrocution existed even if water had been sprayed at the electrical switchboard. The switchboard was insulated and constructed so as to provide a barrier between the dead front and the electrically energized board about a foot behind it. In fact, here the electrical panel could not have endangered a fire fighter if he were spraying water from the position where the electrician was using the large fire extinguisher (see No. 3) because the spray would have been directed away from rather than to the panel. Testimony of the company's fire fighting expert, Rushbrook, as well as the plaintiff's expert, Connell, each set forth the correct procedure in using spray to fight this fire. Water in the form of spray should have been used immediately after it should have been apparent that the hand extinguishers could not have put out the fire. This Court is convinced that the water spray would have extinguished this fire before any substantial damage occurred. The use of spray at the proper time would ipso facto have prevented damage to the cargo which resulted from the spread of the

fire outside the engine room and conduction to the steel bulkheads into the cargo compartments. As indicated, acting Chief Engineer Gikas believed that water could not be used on an oil fire. This misconception had also been encouraged by conversations with the shipowner's superintendent engineer Kaloxylos.

10. The engine room was equipped to fight fire by means of CO_2. About 10 minutes after the fire started, Gikas decided to flood the engine room with the CO_2. He ordered one of the third engineers to close the skylights; another third engineer practically closed the watertight door to the shaft alley. Gikas then ordered everyone to abandon the engine room. With everyone out, he opened the cabinet containing the lever to release the CO_2 into the engine room. This caused the fire to die down but only for a moment. Then it flared up again as strong as ever.

11. The CO_2 failed to extinguish the fire because the gas was lost by reason of openings to the engine room which had not been closed. CO_2 extinguishes fire by excluding the oxygen required to support combustion. Thus, in order to extinguish a fire, the CO_2 must be retained within the space which is on fire. Above the engine room was a very large funnel through which the exhaust stacks pass and within which, among other ships' structures, the ship's horn or trumpet was installed. There was an access door to the funnel located at the base of the funnel on the bridge deck. Also on the funnel were intake ventilators above the bridge deck. The four intake ventilators serving the engine room had dampers attached to handles for closing them.

Appendix D

12. At an annual survey some months before the fire, the handles of at least one ventilator was found to be so frozen that the damper could not be moved. The owner's agents were instructed to correct this and confirm in writing to the vessel's classification society that the correction had been made. The owner did not produce a copy of any written confirmation of such repair. The Court, therefore, draws the inference that repair was not in fact made. There was testimony which the Court accepts as true that flames were seen to be coming out of one ventilator, ergo it must have been open, and its open state contributed to the loss of CO_2 with its resultant failure to extinguish the fire. The other contributing and far greater factor was that the access door of the funnel was open. The funnel itself was not sealed off from the engine room. There were open gratings in the deck separating the annular space of the funnel from the engine room and stairway connecting them. Thus, one could walk through the funnel access door on the bridge deck, down the stairway, and into the engine room below. The access door could be held open by a hook attached to it which fitted into an eye installed on the funnel. The Court is convinced that this door was hooked in an open position at the time the fire broke out. Thus, when the CO_2 flooded the engine room, the size and location of the open door caused the funnel to function as a chimney of the engine room, thereby causing a steady loss of CO_2 along with the rising and billowing upward of smoke and flames.

13. It was obvious to the Court that the CO_2 system would not put out a fire in the engine room if that access door could not be closed. SOLAS 1948 required that there must be provision for closing it which would not

be easily cut off in the event of a fire. Although this requirement was superficially met since the door hook could have been released by means of a boat hook or a pole, and the door could then be pushed shut by the same means even if flames were coming out of it, no evidence was offered that such a hook or pole was either provided or readily available. Moreover, no evidence was offered that the vessel's fire fighting training ever required that a crew member release the hook and close the door before the assumed release of CO_2 into the engine room.

14. The fire drills held by the engine room crew at a "fire fighting exercise" when it was presumed that the CO_2 system was to be activated to flood the engine room were totally deficient as to teaching the necessity of closing *all* openings before releasing the gas, including all ventilators, the access door, and the access hatch at the top of the funnel (see finding No. 21 infra). This deficiency also demonstrates the lack of adequate training and understanding of the proper procedure which must be followed in fighting an engine room fire.

15. Although fire drills were normally held once a week, the drills were almost farcically routine. The only time there was any consideration of the use of water in the engine room was when there was a simulated fire in the bilge. When that occurred, someone (the Court was never able to find out that anyone was given the specific responsibility for this act) was designated to go down the shaft alley and start the emergency water pump engine. The other members of the engine crew unrolled the hoses and pointed them toward the bottom of the bilge and sometime squirted water into it. That's all. If the engine

room was to be "flooded" with CO_2, the Chief Engineer merely telephoned the deck officer on watch to have some member of the deck crew close those openings to the engine room which were located on deck. This included the intake ventilators and the access door of the funnel, if open. The Chief Engineer never received any confirmation of action on this request before he would then proceed to pretend to activate the CO_2 flooding system! Clearly, therefore, there was a lack of defined, coordinated action in fire fighting procedure between the engine room crew and the deck crew. This shipshod procedure was obviously one of the facts which guided Gikas to release the CO_2 without requesting that the deck openings be closed or ascertaining if they were, in fact, closed. When the procedures followed during the fire drills are compared to those followed during this fire, it is manifest that the failure to seal the engine room was not due to the exigency of the emergency but rather due to lack, by the crew, of adequate training and understanding of the basic principles governing the effective use of both water and CO_2 in fighting engine room fires.

16. The owner, Saint Constantine Maritime Co., Ltd., had placed the overall responsibility for fire fighting training on its shoreside superintendent engineer, Kaloxylos. He was definitely a member of the corporate management and had been given broad authority over the maintenance and management of the ship and training of the crew. He had been given responsibility for maintaining an adequate level of fire fighting capability by the crew. Kaloxylos was negligent in fulfilling this responsibility in that he conducted but one instruction on fire drill, when the owners bought the vessel about five years before the fire, and on one occasion thereafter he had observed a fire drill con-

ducted by the deck crew. He did not have a program for checking upon the fire fighting training of the ever-changing officers and crew members of the vessel.

17. During those five years, several persons had succeeded to the position of Chief Engineer of the ST. CONSTANTINE; yet Kaloxylos had set up no system for insuring that the Chief Engineer would be trained in fire fighting techniques for engine room fires. The expectation that the Chief Engineer whom Kaloxylos taught "when the ship was first purchased would pass along his teachings to his replacement" did not fulfill the owner's obligation to see to it that the vessel's crew was adequately prepared to meet the emergency of an engine room fire.[4]

18. When the CO_2 failed to extinguish the fire, Gikas belatedly remembered his obligation to see that the emergency fire pump had been started. He ran aft on the deck intending to go down a ladder to the shaft tunnel. As noted in No. 10 supra, the door to the funnel had been "practically closed". Not being completely shut, smoke from the engine room fire had so filled the tunnel that Gikas, being without any oxygen mask, was unable to get the pump. The vessel was then without any means to fight the fire and the fire was therefore free to spread by conduction through the engine room bulkheads to the adjacent cargo holds and substantially to most of the cargo compartments.

19. The crew's negligence in continuing to use the hand extinguishers after they were clearly unable to control the fire, in failing to use water, and in failing to observe the procedures which were intended to insure the effectiveness

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[4] *CHICKASAW*, 414 F.2d 724, 738 (9th Cir. 1969).

of the use of CO_2 caused the serious damage to the vessel and the loss of most of her cargo.

A few more factual issues must be covered.

20. As noted in No. 12 above, open gratings separated the engine room from the annular space of the funnel. Some ship designs provide a closure for such openings by means of a fire flap or damper which can be closed from outside the funnel in the event of an engine room fire. Kaloxylos believed that the ST. CONSTANTINE was so designed. When confronted with the plans, however, he conceded that no such device was installed on the ST. CONSTANTINE.

21. A few feet below the top edge of the funnel was a steel deck sealing off the entire annular space of the funnel from the outside elements. There was a small access hatch cut through the steel deck. One of cargo's theories was that this access hatch cover was open at the time of the fire, and Roos, as its expert, testified that hot gases but no flame had been traversing the funnel in a mixture too rich to ignite therein, but becoming lean enough when mixing with air on exiting from the top of the funnel to ignite there and burst into flames. This theory arose because of statements of the crew members on the deck and in the boats after abandoning the ship that they had seen flames coming out of the top of the funnel. An analysis of the way in which this testimony was developed through leading questions of cargo's counsel caused this Court to question the stated conclusions. Moreover, from its examination of a photograph taken by a helicoper about one week after the fire broke out, this Court concluded that the access hatch was, in fact, closed at the time of the fire. Other evidence indicated that no one could have closed the access

hatch during that one-week period. This Court accepts the testimony of the owner's expert, Clancey, that when he inspected the area after the fire he saw, inside the funnel, the sooty outline of the ship's trumpet, made of materials which could have withstood little heat. This Court therefore finds that the flames reported by the crew members as coming out of the top of the funnel were coming from or in the vicinity of the outside of the funnel, not out of the top. The Court therefore rejects the testimony of Roos, cargo's expert, supra No. 21. As indicated above, this Court concludes that it was the open access door at the bridge deck which was the exit for the hot gases, smoke, and flames from the engine room fire.

22. During the trial, this Court found, and there so stated, that part of the total CO_2 flooding system did not discharge by reason of an open turnbuckle in the linkage between a row of 11 bottles of CO_2 and a piston whose function was to open the valve of the bottles when the system was being activated. Since the CO_2 system was of vital importance to the safety of the ship, the regular inspection to determine if all of the mechanical components were in a constant state of readiness was necessary. The fact that the turnbuckle was open should have been readily seen by anyone familiar with the functioning of the system. The state of the disconnected turnbuckle indicates a lack of proper training and understanding of the operation and maintenance of the system. This lack of understanding was further illustrated by the action on the part of the first mate with the "advice and consent" of the captain who, after the engine room had been flooded from the bottles of CO_2 specifically maintained for that engine room purpose, pulled the control handles on the bridge deck and

discharged the CO_2 in the remaining bottles into holds that were not yet on fire. Expert testimony established that CO_2 is to be used solely for extinguishing fires already in progress, and that it is not to be used as a preventive measure.

23. There was nothing in the charter party or in the bills of lading issued to cargo by the charterer, Garonne-Glittre, or the subcharterer Barber Lines, A/S, which gave the charterer any direct control over the actual operation and maintenance of the ship or the training of the crew. Those functions were solely the responsibility and under the complete authority of the shipowners. The bills of lading issued by Barber Lines, A/S, in effect were to supply shipping space for cargo on the ST. CONSTANTINE. The charterer had no obligations to hire, train, or inspect the training of the crew nor was it an obligation on the part of Barber Lines, A/S, to ascertain the competence of the crew to fight fire. Under the terms of the charter party the vessel owner assumed responsibility for manning the vessel and keeping it "in a thoroughly efficient state and classified in the highest class Norwegian Veritas". The unseaworthy condition of the ST. CONSTANTINE arose out of the owner's own negligence and constituted a breach of the owner's obligation under the charter party. The charterers, A/S Garonne-Glittre and Barber Lines, A/S, were not in actual fault or privity regarding the cause and continuation of the fire. As indicated above, the charterer's only obligation was to see that the owner fulfilled his obligation to keep the ship "in a thoroughly efficient state and classified in the highest class Norwegian Veritas". The charterers fulfilled this obligation by requiring that the vessel be maintained to the classification standards and by monitoring the ship's

inspection to insure that the standards were being maintained. The charterers are therefore entitled to exoneration under 46 U.S.C. § 1304(2)(b).

CONCLUSIONS: PHASE I

It is now settled law that under the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. § 1300-1315, a carrier's liability may be found only on the basis of fault.[5] In order to recover against the shipowner and charterers in this case, it must be shown that one or the other or both failed to exercise due diligence to make the ship seaworthy or to properly man, equip, and supply the same.[6] If the evidence shows that the vessel was seaworthy or that due diligence had been exercised in making her so, liability under COGSA will be denied. This, however, does not complete the cycle. If this Court holds that the ST. CONSTANTINE was unseaworthy, the shipowners are still entitled to claim to seek protection from liability under 46 U.S.C. §§ 182 and 1304(2)(b).[7]

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[5] G. Gilmore & C. Black, *The Law of Admiralty* 150 (2d ed. 1975).

[6] 46 U.S.C. § 1303(1)(a)&(b).

[7] 46 U.S.C. § 182 provides that

> No owner of any vessel shall be liable to answer for or make good to any person any loss or damage which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner.

(Footnote continued on following page)

Appendix D

The concept of seaworthiness is one which can only be determined from the particular facts of the particular case. Gilmore and Black, supra at 65, notes:

> Seaworthiness is a comprehensive term, and a relative one. The requirement is that the vessel not only be staunch and strong, but also that she be fitted out with a sufficient and competent crew and complement of officers. But these requirements are relative to the voyage or service proposed. A ship that is in one or another of these respects unseaworthy for an Atlantic crossing in December may nonetheless be seaworthy for a coasting run to the South in the same season.

A vessel is considered unseaworthy when she is manned with officers or crew not competently trained in the prevention of shipboard fires.[8]

(Footnote continued from preceding page)

46 U.S.C. § 1304(2)(b) provides that

> Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from— . . . (b) Fire, unless caused by the actual fault of privity of the carrier;

Although section 182 is limited to vessel owners, the time charterer at bar is entitled as a COGSA carrier to the protection of section 1304(2)(b). In re Barracuda Tanker Corp., 409 F.2d 1013, 1015 (2d Cir. 1969). The distinction is of little importance as the phrase "design or neglect" under section 182 has been synonymous with "actual fault or privity" under section 1304(2)(b). Asbestos Corp. Ltd. v. Compagnie De Navigation, 480 F.2d 669, 672 (2d Cir. 1973); Waterman Steamship Corp. v. Gay Cottons, 414 F.2d 724, 729 n.13 (9th Cir.), *modified*, 419 F.2d 372 (9th Cir. 1969); G. Gilmore & C. Black, supra, at 878 n.87.

[8] *In re* Liberty Shipping Corp., 509 F.2d 1049, 1052 (9th Cir. 1975); Orient Mid-East Lines, Inc. v. A Shipment of Rice, Etc., 496 F.2d 1032, 1040 (5th Cir. 1974), *cert. denied*, 420 U.S. 1005 (1975); Cerro Sales Corp. v. Atlantic Marine Enterprises, Inc., 403 F. Supp. 562, 567 (S.D.N.Y. 1975).

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As the preceding findings of fact conclusively show, the ST. CONSTANTINE's crew was not trained in what could even be considered as elementary engine room fire fighting procedures and techniques. The crew's inadequate training deprived the ST. CONSTANTINE of the basic defenses against engine room fires. Gikas' own testimony that he personally did not have time to insure the sealing of all openings into the annular space of the funnel and his further testimony that "if one or two openings had been [left open] I believe that the CO_2 will extinguish the fire" does but further demonstrate his basic lack of understanding as to how an engine room fire must be fought if it is to be controlled. He, the captain, and the mate all showed that they did not possess elemental knowledge of the properties and use of CO_2. All these facts constitute additional evidence of improper crew training. The ST. CONSTANTINE was an unseaworthy vessel on May 26, 1973.[9]

The facts in this case emphasize the absolute necessity of full and complete training of the crew in all techniques available to fight a fire in the engine room. The crew must be trained to act as an organized team so that the best possible decisions will be made under the stress of a fire. The function of making sure the crew is properly trained is always the responsibility of management. It is not sufficient for management to rely upon certification of the ship's crew or prior training or instructions which the officers and crew may have had in fire fighting. A proximate cause of the loss and damage sustained by the owners of cargo was the failure of Saint Constantine Maritime Co., Ltd., to carry out its obligation in regards to fire fighting training of the crew.

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[9] *In re* Liberty Shipping Corp., 509 F.2d 1249, 1252 (9th Cir. 1975).

Appendix D

PHASE II: WHAT CAUSED THE VALVE FLANGE TO BREAK

FINDINGS OF FACT

(a) The experts were practically unanimous that the break in the valve resulted from metal fatigue consummated by cyclical force or motion.

(b) A primary source of this cyclical motion was excessive engine vibration. Several experts testified that the ST. CONSTANTINE suffered from dangerously "chronic", "extraordinary", or "unusually heavy" vibration in the upper region of the vessel's forward end, where the lube oil pipe and valve flange that broke off were located.

(c) Hirsch, a ship service engineer inspecting the vessel in 1970, found vibrations of from five to six millimeters on the forward turbocharger (and the components attached thereto) while the vessel was being operated under open-sea conditions.

(d) That there was excessive engine vibration is further evidenced by the unusual and increasing number of "holding-down" bolt purchases made on behalf of the ST. CONSTANTINE:

(i) The ST. CONSTANTINE had approximately 192 holding-down bolts to keep the vessel's engine stationary;

(ii) Within two years immediately preceding the casualty, approximately 40% of the vessel's holding-down bolts were replaced after they had broken;

(iii) Within approximately six months of the casualty, more than 20% of the vessel's holding-down bolts

were replaced; and within the last three months preceding the casualty, 12.5% of the ST. CONSTANTINE's holding-down bolts were replaced.

(e) Fractured holding-down bolts are always accompanied by bolts which have become loose, and because of the excessive number of loose and broken bolts which needed tightening or replacing, the natural frequency of the engine was perforce lowered, thereby increasing resonance and vibration at lower engine revolutions.

(f) Several experts, including the vessel's Kaloxylos, admitted that there is a direct correlation between loose or broken holding-down bolts and excessive engine vibration, and that by replacing fractured bolts and tightening loosened ones, engine vibration will be alleviated or at least minimized.

(g) Because of the increasing number of bolts being consumed prior to the casualty, as well as the fact that the Hirsch report shows that a majority of the bolts being replaced were from the aft or thrust end of the engine, excessive engine vibration in the upper regions of the engine's forward end was reasonably foreseeable.

(h) Kaloxylos, who made the holding-down bolt purchases on behalf of the owners of the ST. CONSTANTINE, and who was with Hirsch when Hirsch made his observations in 1970, was put on notice by these events that there was something seriously wrong with the engine bed which could lead to damage caused by excessive engine vibration. Kaloxylos failed to investigate the potential cause(s) of these events and, as such, failed to exercise the requisite degree of due diligence which a reasonably prudent shoreside superintendent would have exercised in the same or similar circumstances. Kaloxylos' failure

to exercise due dilegence is further highlighted by his inaction following independent reports in 1968 and 1969 that the ST. CONSTANTINE's main engine was in "critical condition". Kaloxylos simply stated that he felt the 1968 and 1969 reports were "exaggerations" and that the 1970 Hirsch report was "a lie from beginning to end".

(i) Nearly all of the experts, including but not limited to Messrs. Dienstdorf, Hirsch, and Schnitger, were in agreement that excessive vibration had caused the valve flange to break off thereby leading to the casualty at bar. Even Gikas, in his 1973 deposition before the Greek authorities, stated that excessive engine vibration was a probable cause of the fire. An expert Dienstdorf stated that no other force save one of a vibratory nature could have caused this casualty. This Court is convinced that the lube oil valve flange broke off due to excessive engine vibration, and rejects as non-credible the testimony of crew members, Gikas, and Kaloxylos regarding their observations and opinions as to the vessel's seaworthiness as respects the engine vibration.

(j) Defendant urges that a finding of excessive vibration cannot be made on the facts at bar since there is no evidence that the engine's chocks or main bearings were damaged. There was some testimony offered at trial that indicated such damage would necessarily occur sometime after the onset of excessive engine vibration. However, it is not clear what the state of these engine components was within one year of the casualty. In 1973, a survey team headed by Kaloxylos, who summarized the findings of that team, found no damage to the chocks. The testimony of Hirsch, plus the holding-down bolt breakage indicated above, compels this Court, however, to reject as non-credible the Kaloxylos findings. Moreover, chock,

bedding, or shaft bearing damage are not automatic concomitants of excessive engine vibration; damage to these components will occur "some time" after the onset of excessive vibration—a time which the experts were unable to estimate. This Court therefore finds that there was a high probability of the existence of chock and bedding damage within one year of the casualty, which damage was a result of excessive vibration and loose and broken holding-down bolts.

(k) Kaloxylos and Gikas both admitted that there had been a pipe support bracket attached to the lube oil pipe in issue which was not present at the time of the casualty. Photographs of the pipe also showed that some sort of bracket had been on the pipe at some time previous to the fire. Testimony of both expert and fact witnesses clearly established that such brackets are employed to alleviate or at least minimize excessive vibration to the bracketed components. All experts who addressed this particular question were in agreement that if the missing bracket had been in place the casualty would not have occurred.

(l) The ST. CONSTANTINE was unseaworthy in that the shipowner had allowed the vessel to put to sea not reasonably fit for her voyage from Japan to the United States. The shipowner need only have alleviated the excessive engine vibration to the pipe—perhaps by inexpensively bracketing the same, or by reconditioning the engine bed—to make the vessel seaworthy for the issue presented in Phase II.

(m) Kaloxylos had such high rank and authority in shipowners management hierarchy and was vested with such sufficient authority, that his knowledge of the exist-

ence of excessive and thereby dangerously heavy engine vibration is imputed to the owners.[10] Through the knowledge of Kaloxylos of the dubious condition of the engine chocks and bed, as evidenced by the unusual upsurge in holding-down bolt consumption during the three months immediately preceding the casualty, as well as his admitted knowledge of "heavy" engine vibration, the shipowner thereafter had, or should have had, knowledge of the recurring and excessive engine vibration and its potential cause. This Court therefore finds that the shipowner failed to exercise due diligence in making the vessel seaworthy.

CONCLUSIONS: PHASES I AND II:

Since under COGSA a carrier's liability may only be predicated on fault, it must also be demonstrated that the shipowners failed to exercise due diligence in the performance of their COGSA duties before cargo can recover. The term "due diligence" is an amorphous one, but authorities virtually agree that it contemplates that degree of care that is exercised by a reasonably prudent vessel owner.[11] The term certainly contemplates that a shipowner will take such precautions as are reasonably

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[10] *See, e.g.*, Coryell v. Phipps, 317 U.S. 406 (1943) ("executive officer, manager or superintendent whose scope of authority includes supervision over the phase of business of which the loss or injury occurred"); The Willfaro-Willsolo, 9 F.2d 622 (9th Cir. 1925) (general agent); The Admiral—The Cleveco, 154 F. 2d 605 (6th Cir. 1946) (marine superintendent); The Pocone, 159 F.2d 661 (2d Cir. 1947) (port engineer).

[11] The Bill, 47 F. Supp. 969 (D.Md. 1942), *aff'd*, 145 F.2d 470 (4th Cir. 1943).

adequate for the protection of cargo in its custody against known or foreseeable perils.

Upon the facts as found by this Court and reasonable inferences therefrom, this Court is convinced that the shipowners have failed to show that they exercised that degree of care which reasonably prudent shipowners would exercise in the same or similar circumstances. The fire fighting training of the crew was totally inadequate and there was no evidence that the shipowners acted prudently in training or insuring the training of the ST. CONSTANTINE officers, as well as the crew, in fire fighting procedures and techniques.

The only acts of the shipowners which seemed to denote any real concern for the care of the cargo was that they periodically secured certification of seaworthiness from their classification society. This, of course, was demanded of them by the charter party. A shipowner's duty is not ended by securing such certificates. While this Court may consider these certificates in evaluating the existence or non-existence of due diligence, such evidence is not determinative of the question.[12]

As concerns the unseaworthiness of the ST. CONSTANTINE due to its excessive engine vibration and missing bracket, the shipowners had notice three years

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[12] Hampton Roads Carriers, Inc. v. Allied Chemical Corp., 329 F.2d 387, 391 (4th Cir.), cert. denied, 379 U.S. 839 (1964); Artemis Maritime Co. v. Southwestern Sugar & M. Co., 189 F.2d 488, 492 (4th Cir. 1951); Philippine Refining Corporation v. United States, 29 F.2d 134 (E.D.N.Y. 1928), aff'd, 41 F.2d 1010 (2d Cir. 1930).

before the casualty that there was something seriously wrong with the vessel in that she exhibited unusually heavy engine vibration. Reasonable shipowners, with such facts reported to them, may not proceed with a bland "carry on" attitude and merely replace holding-down bolts without taking any other action to remedy the abnormality. To have met their duty of due diligence on this issue it was demanded of the shipowners that they take reasonably adequate remedial action, including, if need be, the re-aligning of the engine bed to minimize or alleviate the excessive engine vibration. The bracketing of the lube oil pipe was clearly mandated when the excessive vibration continued. The failure on the part of the shipowners to take such actions manifests their lack of due diligence to make the ST. CONSTANTINE a seaworthy vessel for the long voyage from Japan to the East Coast ports of the United States.

Conversely, the time charterer A/S Garonne-Glittre and Barber Lines, A/S, fulfilled their obligations as a COGSA carrier to exercise due diligence since they acted as reasonably prudent time charterers in the same or similar circumstances. In the context of the facts as presented, the defendant charterers did all which could be expected of diligent time charterers by mandating within the charter party (1) that the vessel and crew be classified in the highest classification provided by Det Norske Veritas, an internationally recognized classification society; (2) that the vessel comply with all applicable provisions of the Safety of Life at Sea Convention (SOLAS); and (3) that numerous on-hire and class surveys in inspections be performed as a prerequisite to their continued use of the ST. CONSTANTINE and relationship with the Saint Constantine Maritime Co., Ltd. The time charterers must therefore be

exempt from liability since they acted reasonably and prudently within the circumstances of their charter party relationship with the defendant shipowners.

The shipowners, nevertheless, maintain that they are entitled to exoneration from liability because there was no "actual fault or privity" or "design of neglect" on their part.[13] The shipowners, however, must bear the burden of proving that they acted without actual fault, privity, or neglect.[14] While the case law is not unambiguous thereon, the Ninth Circuit, in Sunkist Growers, Inc v. Adelaide Shipping Lines, Ltd. (unpublished opinion No. 76-3112, 9th Cir. 1979) at p. 14 stated:

> [T]he language of §§ 1303(1) and 1304(1) . . . [place] the burden of showing due diligence to provide a seaworthy ship squarely on the shoulders of the carrier. It is this burden that [shipowners] must

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[13] The terms "privity or neglect" are essentially synonymous with "negligence" and, as outlined herein, the shipowners clearly acted negligently in performing their COGSA duties. Coryell v. Phipps, 317 U.S. 406, 411 (1943); *In re* Liberty Shipping Corp., *supra*, at 1252; Asbestos Corp. Ltd. v. Compagnie De Navigation, Etc., 480 F.2d 669, 673 (2d Cir. 1973); Hersey Chocolate Corp. v. The S.S. Robert Luckenbach, 184 F. Supp. 134, 137 (D. Ore. 1960), *aff'd sub nom.* Albina Engine & Machine Wks. v. Hershey Chocolate Corp., 295 F.2d 619 (9th Cir. 1961).

[14] States Steamship Company v. United States, 259 F.2d 458, 474 (9th Cir. 1957), *cert. denied*, 358 U.S. 933 (1959); Waterman Steamship Corporation v. Gay Cottons, 414 F.2d 724, 731 (9th Cir.), *modified*, 419 F.2d 372 (9th Cir. 1969); G. Gilmore & C. Black, *supra*, at 896.

> overcome in order to invoke the exemptions of either § 1304(2)(b) or the Fire Statute.[15]

The Ninth Circuit also in *In re* Liberty Shipping Corp., 509 F.2d 1249, 1251 (9th Cir. 1975) stated:

> . . . an inexcusable condition of unseaworthiness of a vessel which in fact causes the damage—either by starting a fire or by preventing its extinguishment—will exclude the shipowners from the exemption of the Fire Statute and COGSA."[16]

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[15] There are numerous cases which hold that due diligence is not a prerequisite to statutory exemption, some of which are: Stodart v. Ellerman's Wilson Line, 287 U.S. 420 (1932); Waterman Steamship Corporation v. Gay Cottons, 414 F.2d 724, 731 (9th Cir. 1969); Federazione Italiana Dei Cors. A. v. Mandask Compania De V., 388 F.2d 434, 436 (2d Cir. 1968), *cert. denied*, 393 U.S. 866 (1969); Horn v. Cia de Navegacion Fruco, S.A., 404 F.2d 422 (5th Cir. 1968), *cert. denied*, 394 U.S. 943 (1969); Lekas & Drivas, Inc. v. Goulandris, 306 F.2d 426, 429 (2d Cir. 1962); Edmund Weil, Inc. v. American West African Line, Inc., 147 F.2d 363, 366 (2d Cir. 1945); American Tobacco Co. v. The Katingo Hadjipatera, 194 F.2d 449, 450 (2d Cir. 1951), *cert. denied*, 343 U.S. 978 (1952); Asbestos Corp. Ltd. v. Compangnie de Navigation, Etc., 345 F. Supp. 814, 820 (S.D.N.Y. 1972), *aff'd* 480 F.2d 669 (2d Cir. 1973); Wilbur-Ellis Co. v. M/V Capatannis, 306 F. Supp. 866, 871 (D. Ore. 1969), *aff'd*, 451 F.2d 973 (9th Cir. 1971), *cert. denied*, 405 U.S. 923 (1972); Karobi Lumber Co. v. S.S. Norco, 249 F. Supp. 324, 326 (S.D. Ala. 1966), *aff'd sub nom.* Dods Shipping, Ltd. of Nassau, N.P. v. Karobi Lumber Co., 397 F.2d 570 (5th Cir. 1968); Yawata Iron & S. Co. Ltd. v. Anthony Ship. Co. Ltd., 396 F. Supp. 619, 621 (S.D.N.Y. 1975), *aff'd* 538 F.2d 317 (2d Cir. 1976).

[16] See also Asbestos Corp., Ltd. v. Compagnie De Navigation, Etc., 480 F.2d 669, 672 (2d Cir. 1973); Cerro Sales Corp. v. Atlantic Marine Enterprises, Inc., 403 F. Supp. 562, 567 (S.D. N.Y. 1975).

Appendix D

As above set forth, the facts here are that the inexcusable condition of unseaworthiness of the ST. CONSTANTINE both actually and proximately caused the fire through excessive engine vibration and lack of a bracket and prevented its extinguishment through an inadequately trained crew.

This Court recognizes that such a conclusion does not end the matter. Beyond this, the statute demands that the neglect of the owners under the exemption statutes must be shown to be that of "the neglect of the owner personally or, in the case of a corporate owner, the neglect of managing officers and agents as distinguished from that of the master or the members of the crews or subordinate employees."[17]

As this Court found above, Kaloxylos, the vessel owners' shoreside superintendent engineer, was the person designated by management with the duty and obligation of controlling and overseeing the fire fighting training which was to be given the officers and crew of the ST. CONSTANTINE. It was also his duty to approve and make the holding-down bolt purchases for the vessel—such actions being taken on behalf of the shipowners. Kaloxylos was put upon notice of the vessel's dangerously heavy and excessive vibration three years before the casualty. Kaloxylos was of such significant rank in the management hierarchy and was vested with such authority that his negligence in not insuring a properly trained crew and a properly equipped vessel, plus his knowledge of the existence of dangerously ex-

[17] Albina Engine & Machine Works v. Hershey Chocolate Corp., 295 F.2d 619, 621 (9th Cir. 1961); *In re* Liberty Shipping, *supra*, at 1251-52.

cessive engine vibrations are, therefore, all imputed to the shipowners.[18]

The fact that Kaloxylos was not personally involved in fire fighting training of each and every member of the crew or that he was not aware nor personally caused the bracket to be absent from its place on the lube oil line pipe is irrelevant since the duty of a shipowner to provide a seaworthy vessel is a non-delegable one.[19]

DECISION

The Saint Constantine Maritime Co., Ltd., is liable to the plaintiff for the loss and damage to plaintiff's cargo caused by the fire and subsequent frustration of the voyage.

DATED: Honolulu, Hawaii, Feb. 21, 1980

Martin Pence
Judge of the above-entitled Court

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[18] *See, e.g.,* Coryell v. Phipps, 317 U.S. 406 (1943) ("executive officer, manager or superintendent whose scope of authority includes supervision over the phase of business of which the loss or injury occurred"); The Willfaro-Willsolo, 9 F.2d 622 (9th Cir. 1925) (general agent); The Admiral—The Cleveco, 154 F.2d 605 (6th Cir. 1946) (marine superintendent); The Pocone, 159 F.2d 661 (2d Cir. 1947) (port engineer).

[19] Federazione Italiana Dei Corsori Agari v. Mandask Campania De Vapores, S.A., 388 F.2d 434 (2d Cir. 1968), *cert denied,* 393 U.S. 828 (1969); Artemis Maritime Co. v. Southwestern Sugar & Molasses Co., 189 F.2d 488 (4th Cir. 1959).

APPENDIX E

Judgment of the United States District Court for the District of Hawaii

(Filed—October 31, 1981)

IN THE

UNITED STATES DISTRICT COURT
For the District of Hawaii

HASBRO INDUSTRIES, INC.,

Plaintiff,

vs.

M/S "ST. CONSTANTINE," et al.,

Defendants,

vs.

A/S GARONNE-GLITTRE, et al.,

Plaintiffs in Intervention.

Civil No. 73-3848

In the Matter of the Complaint

of

SAINT CONSTANTINE MARITIME CO., LTD., as Owner of the M.S. "ST. CONSTANTINE", for Exoneration from or Limitation of Liability

Civil No. 73-3955

Appendix D

JUDGMENT

WHEREAS, the issues in these consolidated cases were divided by the Court into three phases for purposes of trial: Phases I and II relating to the liability issues and Phase III relating to the damage issue; and

WHEREAS, Phases I and II were duly tried before the Court, the Honorable Martin Pence, United States District Judge, presiding; and

WHEREAS, the Court filed its Decision on Phases I and II on February 21, 1980; and

WHEREAS, the Court ruled in its Decision on Motion for Award of Attorneys' Fees and Costs, filed herein on January 19, 1981, that charterers A/S Garonne-Glittre and Barber Lines A/S were entitled to recover from the Saint Constantine Maritime Company, Ltd. (hereinafter "Maritime Company") stipulated attorneys fees of $380,000 plus costs, which attorneys' fees were substantially reduced by stipulation to include costs and attorneys' fees of $279,346.36; and

WHEREAS, the Motion for Partial Summary Judgment and Pre-Judgment Interest of plaintiff cargo claimants represented by Messrs. Bigham, Englar, Jones & Houston (hereinafter "Bigham cargo") as to Phase III (damages) has been granted by Order filed herein on Oct. 31, 1981; and

WHEREAS, plaintiff cargo claimants in this action, other than Bigham cargo, have settled their claims herein; and

WHEREAS, there appears no just reason for delay in the entry of a final, appealable judgment within the meaning of Rule 54(b), Federal Rules of Civil Procedure;

NOW, THEREFORE, IT IS ORDERED AND ADJUDGED that:

(1) Bigham cargo recover nothing on their cross-claims from charterers A/S Garonne-Glittre and Barber Lines A/S, and the same are dismissed with costs; and

(2) A/S Garonne-Glittre and Barber Lines A/S recover jointly and severally on its cross-claim from Maritime Company the sum of TWO HUNDRED SEVENTY-NINE THOUSAND THREE HUNDRED FORTY-SIX AND 36/100 DOLLARS ($279,346.36) as attorney fees and disbursements; and

(3) Bigham cargo recover on its complaint from M.S. St. Constantine and Maritime Company, jointly and severally, the sum of FIVE MILLION SEVEN HUNDRED TWENTY-FIVE THOUSAND THREE HUNDRED FOUR AND 00/100 DOLLARS ($5,725,304.00), plus prejudgment interest in the sum of THREE MILLION ONE HUNDRED SIXTY-ONE THOUSAND SIX HUNDRED EIGHTY-EIGHT AND 60/100 DOLLARS ($3,161,688.60) through the date of October 2, 1981, for a total sum of principal and interest of EIGHT MILLION EIGHT HUNDRED EIGHTY-SIX THOUSAND NINE HUNDRED NINETY-TWO AND 60/100 DOLLARS ($8,886,992.60), plus costs as allows by law, upon which execution may issue.

(4) This judgment be entered forthwith as an appealable judgment within the meaning of Rule 54(b), Federal Rules of Civil Procedure.

Dated: Honolulu, Hawaii, October 31, 1981 at 2:55 p.m.

/s/ MARTIN PENCE
U. S. District Judge

Appendix D

APPROVED AS TO FORM:

/s/ DAVID W. PROUDFOOT
Attorney for Saint Constantine
Maritime Company, Ltd. and
M.S. St. Constantine

/s/ WILLIAM L. FLEMING
Attorney for A/S Garonne-Glittre
and Barber Lines A/S

Civil Nos. 73-3848 and 73-3955

Hasbro Industries, Inc. v. M. S. "St. Constantine", et al.

Judgment